

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 14 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LUIS ANTONIO ROMAY-CRUZ,

Defendant - Appellant.

No. 04-30455

D.C. No. CR-04-00047-RHW

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted September 12, 2005
Seattle, Washington

Before: BROWNING, ALARCON, and KLEINFELD, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Romay-Cruz is correct that his Washington conviction for third degree assault is not categorically¹ a “crime of violence.”² The serious issue here is whether “the statutory definition of the crime, charging document, written plea agreement, transcript of plea colloquy or any explicit factual finding by the trial judge to which the defendant assented”³ establish that Romay-Cruz did in fact commit a “crime of violence.”

Although he was sentenced on the basis of facts that would make his crime a crime of violence, he did not stipulate to or admit those facts. By checking the box on the printed form that allowed the court to consider the affidavit, Romay-Cruz was not stipulating that the facts were true, but merely that the Superior Court could use the prosecution’s allegations as a basis for accepting the plea. This conclusion is the only one possible in light of Romay-Cruz’s concurrent statement that he was drunk and does not remember the incident. If he really was drunk and

¹Taylor v. United States, 495 U.S. 575 (1990). See also, United States v. Fish, 368 F.3d 1200 (9th Cir. 2004).

²U.S.S.G. § 2L1.2(b)(1)(A)(ii); United States v. Sandoval, 390 F.3d 1077, 1081 (9th Cir. 2004).

³Shepard v. United States, 544 U.S. ___, 125 S. Ct. 1254, 1257 (2005).

could not remember, then Roday-Cruz could not truthfully say that the facts were as the officer said, just that he was in no position to claim otherwise.

The Supreme Court dealt with a similar situation in Shepard. There, it was significant that the defendant maintained that he had never admitted that the facts in the police reports were true.⁴ Similarly, Roday-Cruz does not admit or deny the truth of the facts in the affidavit because he says he has no recollection of the facts at all. He merely agreed that the court could assume the facts provided in the police affidavit for purposes of his plea. Therefore, under the modified categorical approach this record does not support a finding that Roday-Cruz's prior conviction was for a crime of violence. Accordingly, we VACATE the district court's sentence and REMAND for resentencing.

⁴Shepard v. U.S., 544 U.S. at ___, 125 S. Ct. at 1258-59 (2005).